TIMBALAN KETUA POLIS KELANTAN & ANOR

v.

ISHAK MANSOR

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
JEFFREY TAN JCA
CLEMENT SKINNER JCA
[CIVIL APPEAL NO: D-01-121-2006]
3 SEPTEMBER 2012

ADMINISTRATIVE LAW: *Dismissal from service - Wrongful dismissal - Issuance of restriction order against respondent pursuant to s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 - First appellant imposed punishment of dismissal against respondent vide Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulation') - High Court held respondent's dismissal invalid - Whether provisions in Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 should have been resorted to instead of 1993 Regulation - Appeal against decision of High Court - Whether respondent as junior police officer can only be subjected to one disciplinary Regulation - Federal Constitution, art. 135*

POLICE: *Disciplinary proceedings - Dismissal - Issuance of restriction order against respondent pursuant to s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 - First appellant imposed punishment of dismissal against respondent vide Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulation') - High Court held respondent's dismissal invalid - Whether provisions in Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 should have been resorted to instead of 1993 Regulation - Appeal against decision of High Court - Whether respondent as junior police officer can only be subjected to one disciplinary Regulation - Federal Constitution, art. 135*

This was an appeal by the appellants ('defendants') against the decision of the High Court Judge in allowing the respondent's ('plaintiff') claim. The first defendant, in his capacity as the disciplinary authority, had issued a show cause notice to the plaintiff, who was a corporal in the Royal Malaysia Police Force ('the force'), in respect of eight disciplinary offences. After the issuance and service of the said show cause notice, the Deputy Minister of Home Affairs had on 15 April 1997 issued a restriction

order ('the restriction order') under s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the 1969 Ordinance') against the plaintiff for a period of two years with effect from 15 April 1997. By virtue of reg. 46(1) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulation'), the first defendant issued a letter to the plaintiff wherein the latter was informed that he was suspended from exercising his duties. After considering the restriction order, the first defendant, in exercise of the powers conferred by regs. 37 and 38(g) of the 1993 Regulation, imposed the punishment of dismissal on the plaintiff with effect from the date of the restriction order. Two years later, the plaintiff filed a suit in the High Court on the premise of challenging the validity of the restriction order. Subsequently, in his amended statement of claim, the plaintiff prayed for, *inter alia*, (i) that his dismissal under reg. 37 of the 1993 Regulation was invalid and of no legal effect; and (ii) he was still an employee of the Government of Malaysia with the rank of corporal in the police force. The learned judge was of the view that in the absence of a similar provision to reg. 37 of the 1993 Regulation being inserted into the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the 1970 Regulation'), it was not open for the disciplinary authority to adopt the procedure set out in reg. 37 of the 1993 Regulation. In allowing the plaintiff's claim and setting aside the order of dismissal made against the plaintiff, the learned High Court Judge ruled, *inter alia*, (i) that the 1993 Regulation did not apply to the plaintiff; (ii) the plaintiff, being a junior police officer, could only be subjected to one disciplinary regulation; and (iii) the disciplinary authority had erred in adopting the procedure prescribed in the 1993 Regulation. Dissatisfied with the said decision, the defendants appealed to this court. The Senior Federal Counsel submitted that all of the regulations, in particular reg. 37 of the 1993 Regulation had been strictly complied with and the plaintiff's dismissal was in accordance with the procedure prescribed by law.

Held (allowing appeal with costs)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) This action was filed by the plaintiff after the restriction order had already lapsed. The amendment to the statement of claim showed that the validity of the restriction order was no longer the subject matter of challenge. Further, the cause of action consequent upon the amended pleadings was no longer

grounded on an invalid restriction order but allegedly by reason of the disciplinary authority having adopted a procedure which was not applicable to him. (paras 34 & 35)

(2) The provisions of the Federal Constitution, the Police Act 1967 as well as the 1970 and 1993 Regulations must be read together and be given a harmonious construction. This court was unable to agree with the learned judge's ruling that a junior police officer could be subjected to only one disciplinary regulation. There was no such general principle. A junior police force could certainly be subjected to more than one regulation. Whether or not a particular regulation was applicable to such an officer must necessarily depend on the express words used in that regulation. (paras 38 & 40)

(3) Not only was the 1970 Regulation applicable to the plaintiff but the 1993 Regulation was equally applicable to him. There was no clause in the 1993 Regulation expressly excluding junior police officers from its application. Effect must be given to reg. 2 of the 1993 Regulation which expressly provides that the 1993 Regulation applies to an "officer" throughout the period of his service. The same section defines an "officer" to mean "a member of the public service of the Federation" of which the plaintiff was certainly one. (para 41)

(4) Since there was no express provision as to the procedure to be followed by the disciplinary authority in the 1970 Regulation when a restriction order was issued, the disciplinary authority was right in following the procedure as prescribed by reg. 37 of the 1993 Regulation. Such a construction would accordingly be in accordance with cl. 2(d) of art. 135 Federal Constitution. The plaintiff, being the subject of a restriction order under the 1969 Ordinance, was clearly not entitled to be given the right to be heard. The interpretation given by the learned judge in ruling that reg. 37 of the 1993 Regulation was not applicable to the plaintiff would result in the disciplinary authority having to observe the orderly room procedure in respect of the misconduct that had been committed. Such an interpretation was clearly inconsistent with the intention of the legislature taking away the right of such a public officer who was the subject of such an order to be heard. (paras 42 & 43)

(5) There was no flaw in the decision making process of the disciplinary authority in making the order of dismissal against the plaintiff. Once the restriction order under the 1969 Ordinance had been issued by the Minister of Home Affairs, it was incumbent upon the disciplinary authority to exercise the power conferred upon them by regs. 36 and 46. Thereafter, reg. 37 of the 1993 Regulation applied. Hence, in considering the appropriate punishment to be imposed, the disciplinary authority had deemed it fit to impose the most severe punishment upon the plaintiff. (paras 45 & 46)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu-perayu ('defendan-defendan') terhadap keputusan Mahkamah Tinggi dalam membenarkan tuntutan responden ('plaintif'). Defendan pertama, dalam kapasitinya sebagai pihak berkuasa disiplin, telah mengeluarkan notis tunjuk sebab kepada plaintif, yang berpangkat koperal dalam Pasukan Polis diRaja Malaysia ('pasukan'), berkenaan lapan kesalahan disiplin. Selepas pengeluaran dan penyampaian notis tunjuk sebab tersebut, Timbalan Menteri Hal Ehwal Dalam Negeri telah pada 15 April 1997 mengeluarkan satu perintah sekatan ('perintah sekatan') di bawah s. 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan 1969') terhadap plaintif bagi tempoh dua tahun bermula dari 15 April 1997. Melalui per. 46(1) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993'), defendan pertama telah mengeluarkan satu surat kepada plaintif di mana plaintif telah dimaklumkan bahawa beliau telah digantung daripada menjalankan tugas-tugasannya. Selepas mempertimbangkan perintah sekatan itu, defendan pertama, dalam menjalankan kuasanya di bawah per. 37 dan per. 38(g) Peraturan 1993, telah mengenakan hukuman pembuangan kerja terhadap plaintif berkuatkuasa dari tarikh perintah sekatan itu. Dua tahun selepas itu, plaintif telah memfailkan tindakannya di Mahkamah Tinggi untuk mencabar kesahan perintah sekatan itu. Selepas itu, di dalam penyata tuntutan terpindanya, plaintif memohon, antara lain, (i) bahawa pembuangan kerjanya di bawah per. 37 Peraturan 1993 adalah tidak sah dan tidak mempunyai kesan di sisi undang-undang; dan (ii) bahawa beliau masih seorang pekerja Kerajaan Malaysia dengan pangkat korporal dalam pasukan polis. Yang Arif

Hakim berpandangan bahawa dalam ketiadaan peruntukan yang sama kepada per. 37 Peraturan 1993 dimasukkan ke dalam Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-mata) 1970 ('Peraturan 1970'), ianya tidak terbuka kepada pihak disiplin untuk menggunakan prosedur dalam per. 37 Peraturan 1993. Dalam membenarkan tuntutan plaintif dan mengenepikan perintah pembuangan kerja yang dibuat terhadap plaintif, Yang Arif Hakim Mahkamah Tinggi memutuskan, antara lain, bahawa: (i) Peraturan 1993 tidak terpakai kepada plaintif; (ii) memandangkan plaintif adalah seorang pegawai polis rendah, beliau hanya boleh tertakluk kepada satu Peraturan disiplin; dan (iii) pihak berkuasa disiplin salah dalam menggunakan prosedur yang dinyatakan dalam Peraturan 1993. Tidak puas hati dengan keputusan tersebut, defendan-defendan merayu ke mahkamah ini. Peguam Kanan Persekutuan berhujah bahawa kesemua peraturan, terutamanya per. 37 Peraturan 1993 telah pun dipatuhi dan pembuangan kerja plaintif adalah berdasarkan undang-undang.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Tindakan ini telah difailkan oleh plaintif selepas perintah sekatan luput. Pindaan kepada penyata tuntutan menunjukkan bahawa kesahan perintah sekatan itu tidak lagi menjadi subjek perkara untuk dicabar. Lagipun, kausa tindakan berikutan pindaan kepada pliding tidak lagi berasas terhadap suatu perintah sekatan yang tidak sah tetapi dengan alasan bahawa pihak disiplin telah menggunakan prosedur yang tidak terpakai terhadapnya.

(2) Peruntukan Perlembagaan Persekutuan, Akta Polis 1967 dan juga Peraturan 1970 dan Peraturan 1993 mesti dibaca bersama untuk diberikan pentafsiran secara harmoni. Mahkamah ini tidak dapat bersetuju dengan keputusan Yang Arif Hakim bahawa seorang pegawai polis rendah hanya boleh tertakluk kepada satu peraturan disiplin. Tiada prinsip am sebegitu. Pasukan polis rendah boleh ditaklukkan kepada lebih daripada satu peraturan. Sama ada sesuatu peraturan itu terpakai terhadap seseorang pegawai adalah bergantung kepada perkataan ekspres yang digunakan di dalam peraturan itu.

(3) Bukan sahaja Peraturan 1970 terpakai kepada plaintif malah Peraturan 1993 juga terpakai terhadapnya. Tiada klausa di dalam Peraturan 1993 yang secara langsung mengecualikan pegawai polis rendah daripada penggunaannya. Kesan mesti diberi kepada per. 2 Peraturan 1993 yang secara langsung menyatakan bahawa Peraturan 1993 terpakai kepada seorang "pegawai" selama tempoh perkhidmatannya. Seksyen yang sama mentakrifkan seorang "pegawai" untuk membawa maksud "seorang ahli perkhidmatan awam Persekutuan" di mana plaintif memang adalah seorang daripadanya.

(4) Memandangkan tiada peruntukan jelas berkenaan prosedur yang perlu diikuti oleh pihak berkuasa disiplin di dalam Peraturan 1970 apabila perintah sekatan dikeluarkan, adalah betul untuk pihak berkuasa disiplin dalam mengikut prosedur seperti dinyatakan dalam per. 37 Peraturan 1993. Pentakrifan sebegitu adalah menurut kl. 2(d) fasal 135 Perlembagaan Persekutuan. Plaintif, tertakluk kepada perintah sekatan di bawah Ordinan 1969, dengan jelasnya tidak layak diberi hak untuk didengar. Pentakrifan yang diberi oleh Yang Arif Hakim dalam memutuskan bahawa per. 37 Peraturan 1993 tidak terpakai kepada plaintif akan mengakibatkan pihak berkuasa disiplin memerhati dengan teraturnya prosedur berkenaan salah laku yang telah dilakukannya. Pentakrifan sebegini jelas menunjukkan bahawa ia tidak konsisten dengan niat perundangan dalam menafikan hak seseorang pegawai awam tersebut yang tertakluk kepada perintah itu untuk didengar.

(5) Tiada kecacatan dalam proses membuat keputusan oleh pihak berkuasa disiplin dalam membuat perintah pembuangan kerja terhadap plaintif. Apabila suatu perintah sekatan dibuat di bawah Ordinan 1969 dikeluarkan oleh Menteri Hal Ehwal Dalam Negeri, adalah tanggungjawab pihak berkuasa disiplin untuk menjalankan kuasa yang diberi kepada mereka di bawah per. 36 dan per. 46. Selepas itu, per. 37 Peraturan 1993 adalah terpakai. Oleh itu, dalam mempertimbangkan hukuman yang wajar dikenakan, pihak berkuasa disiplin telah menyifatkannya sebagai munasabah untuk mengenakan hukuman yang paling berat ke atas plaintif.

A **Case(s) referred to:**

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(dist)***

Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC ***(refd)***

B **Legislation referred to:**

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4A(1)

Federal Constitution, arts. 132(2), 135

Police Act 1967, ss. 18, 74, 96

C Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, regs. 1, 2, 3, 4, 5, 6, 7, 8

Public Officers (Conduct and Discipline) Regulations 1993, regs. 36, 37, 38(g), 46(1)

Police Regulations 1952, reg. 9

D *For the appellant - Aida Adha Abu Bakar (Nizar Zakaria with her) SFCs*
For the respondent - Datuk Hj Md Latip Sarruggi (Murni Suranti with him); M/s Mohd Latif & Assocs

[Appeal from High Court, Kota Bharu; Civil Suit No: MT3-21-2-2000]

E *Reported by Kumitha Abd Majid*

JUDGMENT

F **Zaleha Zahari JCA:**

[1] We allowed the defendants' (appellants') appeal against the decision of the High Court Judge dated 16 May 2005 in allowing the plaintiff's (respondent's) claim for the following reasons.

G **The Law**

[2] The legal provisions referred to us in arguments in this appeal are these.

H (a) Article 135(2) Federal Constitution

135. (1) ...

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

I Provided that this clause shall not apply to the following cases:

(a) ...

(b) ...

(c) ...

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

The Police Act 1967

[3] Sections 18 and 74 of the Police Act 1967 ("Police Act") provides as follows:

18. Save as otherwise provided in this Act and the Rules and Regulations made thereunder, every police officer shall unless expressly excluded be subject to the same provisions as are applicable to other public officers of corresponding status in the service of the Government of Malaysia.

...

...

74. All members of the Force shall be subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under Article 132(2) of the Federal Constitution or under section 96 of this Act.

The Regulations

[4] At the time of the plaintiff's dismissal in 1997, there were two regulations in force pertaining to matters of discipline governing members of the police force ie, the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 [PU(A) 86/1970] ("the 1970 Regulations") and the Public Officers (Conduct and Discipline) Regulations 1993 [PU(A) 395/1993] ("the 1993 Regulations").

The Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970

[5] These regulations made by the Yang Di-Pertuan Agong in exercise of the powers conferred by s. 96 of the Police Act consists of only nine clauses.

[6] Regulation 1, the citation clause, identifies the personnel subjected to the regulations. It applies to junior police officers and constables.

[7] Regulation 2 specifies the disciplinary offences as being that prescribed in the schedule annexed to the regulations. The schedule lists 66 disciplinary offences.

[8] Regulation 3 sets out the procedure to be followed when disciplinary proceedings are instituted against an officer. The various punishments that can be meted out are as set out in sub-para. (a) to (g) upon a finding of guilt.

[9] Regulations 4 and 5 set out the rights available to an officer who is subjected to disciplinary action. These include the right to be supplied with documents connected to the disciplinary offence and to be represented at the enquiry by a police officer of his choice.

[10] Regulation 6 outlines the procedure to be followed at the enquiry (ie, the orderly room procedure) if the officer pleads guilty, and should he not plead guilty. The power to confirm and discharge the officer is given to the adjudicating authority in *lieu* of awarding any other punishment by virtue of reg. 7 as is the power to adjourn any disciplinary enquiry from time to time (reg. 8).

[11] Regulation 9 refers to the revocation of Part 1 of the Police Regulations 1952.

[12] The 1970 Regulations have since been repealed by the Police (Conduct and Discipline) (Junior Police Officers and Constables) (Repeal) Regulations 2000 [P.U (A) 451/ 2000] with effect from 1 January 2001.

The Public Officers (Conduct And Discipline) Regulations 1993

[13] The Public Officers (Conduct and Discipline) Regulations 1993 [PU(A) 395/1993] ("the 1993 Regulations") was made by the Yang di-Pertuan Agong in exercise of the powers conferred by

cl. 2 of art. 132 of the Federal Constitution. It has been subjected to several amendments over the years. The provisions as it stood when the decision to dismiss the plaintiff from service was made in 1997, and accordingly which is applicable to the facts of this case, are these.

[14] Regulation 36 prescribes the procedure to be followed when an order of detention, supervision, restricted residence is made against an officer. It provides as follows:

> 36. (1) Where:
>
> (a) an order of detention, supervision, restricted residence, banishment or deportation has been made against an officer; or
>
> (b) an order which imposes on the officer any form of restriction or supervision, whether with bond or otherwise, has been made against an officer,
>
> under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, ... the Head of Department shall apply for a copy of the order from the appropriate authority. Upon receipt of a copy of such order, the Head of Department shall immediately submit it to the appropriate Disciplinary Authority that has the power to impose a punishment of dismissal or reduction in rank, and the appropriate Disciplinary Authority shall forthwith suspend the officer from the exercise of his duties.
>
> (2) The Head of Department shall forward a report to the appropriate Disciplinary Authority that has the power to impose a punishment of dismissal or reduction in rank, together with the record of service of the officer, and shall recommend whether the officer should:
>
> (a) be dismissed or reduced in rank;
>
> (b) be imposed with any punishment other than the punishment of dismissal or reduction in rank;
>
> (c) have his service terminated in the public interest; or
>
> (d) not be imposed with any punishment,
>
> depending on the extent the officer has brought disrepute to the public service.

A 37. (1) Where after considering the report and the recommendation of the Head of Department forwarded in accordance with … regulation 36, the appropriate Disciplinary Authority is of the opinion:

(a) that the officer should be dismissed or reduced in rank, the B Disciplinary Authority shall forthwith impose the appropriate punishment;

(b) …

(c) … C

[15] On this issue reg. 46 is also relevant. It provides as follows:

46. (1) The appropriate Disciplinary Authority that has the power to impose a punishment of dismissal or reduction in rank shall suspend an officer from the exercise of his duties: D

(a) …

(b) where an order of detention or restriction as specified in regulation 36 is made or imposed against the officer.

E (2) The date of suspension under this regulation shall commence from ... the effective date of the order of detention or restriction, as the case may be.

(3) An officer who is suspended from the exercise of his duties: F

(a) …

(b) shall not be allowed to receive any emoluments from the date of his suspension.

G (4) A decision to suspend the officer shall be conveyed to him in writing.

Background

[16] The background facts are as follows: The plaintiff at the H material time holds the rank of Corporal in the Royal Malaysia Police Force ("the force").

[17] On 13 April 1997, the plaintiff was served with a show cause notice issued by the 1st defendant (in his capacity as the I disciplinary authority) in respect of 8 disciplinary offences. The

plaintiff was informed that an inquiry would be held on 5 May 1997 at 10am. The inquiry however did not take place by reason of what subsequently transpired.

[18] The record shows that after the issuance and service of the said show cause notice, the Deputy Minister of Home Affairs had, on 15 April 1997, issued a Restriction Order under s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the 1969 Ordinance") against the plaintiff ("the Restriction Order") for a period of two years with effect from 15 April 1997 upon the conditions specified therein. The grounds upon which the Restriction Order was made was specified in the Annexure to the Restriction Order. It states as follows:

ORDINAN DARURAT (KETENTERAMAN AWAM DAN MENCEGAH JENAYAH) 5/69

NAMA ORANG SEKATAN: ISHAK BIN MANSOR

NO. K/P: 5721966

ALASAN-ALASAN YANG ATASNYA PERINTAH ITU DIBUAT:

Kamu adalah seorang ahli kumpulan samun dan peras ugut yang melakukan kegiatan jenayah kekerasan dimana tindakan kamu itu telah menjejas dan memudaratkan ketenteraman awam.

TUDUHAN-TUDUHAN YANG PERINTAH ITU BERASASKAN:

Bahawa kamu adalah seorang ahli kumpulan samun dan peras ugut di sekitar Rantau Panjng, Kelantan. Di antara kegiatan Jenayah kekerasan yang kamu pernah terlibat ialah:

1. Bahawa kamu pada bulan Oktober, 1995, di Pengkalan Haram Pound, Rantau Panjang, Kelantan kamu bersama 8 orang rakan telah menahan dan memeriksa seramai 9 orang rakyat asing serta merampas wang sebanyak RM250.00 dari rakyat asing tersebut.

Dengan Arahan,
Timbalan Menteri Dalam Negeri

t.t.
(KASIM BIN MD. ISA)
Penolong Setiausaha
Kementerian Dalam Negeri

[19] The 1st defendant then, in exercise of the powers conferred by reg. 46(1) of the 1993 Regulations, issued a letter dated 15 April 1997 by which letter the plaintiff was informed that pursuant to reg. 46(1) of the 1993 Regulations he was suspended from exercising his duties and that he would not be paid any emoluments during the period of his suspension. The letter states as follows:

> Ibu Pejabat Polis Kontijen
> Polis DiRaja Malaysia
> 15990 Kota Bharu
> Kelantan
>
> Rujukan: (PR) RF/74999
>
> Tarikh: 15 April, 1997
>
> Encik Ishak bin Mansor,
> Kopral - RF/74999
>
> GANTUNG KERJA
>
> Adalah saya Nordin bin Zakaria, P/SAC II Timbalan Ketua Polis Kelantan, pada menjalankan kuasa-kuasa tatatertib yang diwakilkan kepada saya oleh Suruhanjaya Pasukan Polis melalui P.U.(B) 621 bertarikh 19/12/85, memandangkan anda telah dikenakan Perintah Sekatan di bawah seksyen 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) No. 5/69 selama 2 tahun mulai 15 April 1997, di Bandaran Jasin, Daerah Jasin, Melaka, memutuskan iaitu anda di "Gantung Kerja" di bawah peraturan 46(1) peraturan-peraturan pegawai awam (Kelakuan dan Tatatertib) 1993 mulai 15 April 1997 iaitu tarikh anda dikenakan Perintah Sekatan.
>
> 2. Semasa anda di "Gantung Kerja", anda tidak berhak menerima apa-apa bahagian emolumen yang tidak di bayar semasa anda di Tahan Kerja mengikut Peraturan 46(3)(a) dan anda juga tidak berhak menerima apa-apa emolumen mulai tarikh anda di "Gantung Kerja" mengikut Peraturan 46(3)(b), Peraturan yang sama.
>
> 3. Sila akui penerimaan surat ini dengan menandatangani di ruangan yang telah di sediakan.
>
> t.t.
> (NORDIN BIN ZAKARIA) P/SAC II
> TIMBALAN KETUA POLIS KELANTAN

AKUAN TERIMA

Saya, Ishak bin Mansor mengaku menerima naskah asal surat gantung kerja bilangan RF 74999 bertarikh 15.4.1997 pada 16.4.1997 jam 1545 hrs.

Diserahkan oleh : (Ali Bin Mohamad) Supt
Ketua Polis Daerah
18300 Gua Musang
Kelantan

Tarikh/Masa : 16.4.1997 1545 hrs

[20] Thereafter, after considering the Restriction Order made against the plaintiff, the 1st defendant was of the opinion that the plaintiff should be dismissed from service. The 1st defendant then, in exercise of the powers conferred by regs. 37 and 38(g) of the 1993 Regulations, by letter dated 16 April 1997, imposed the punishment of dismissal on the plaintiff with effect from the date of the Restriction Order. The letter states as follows:

Ibu Pejabat Polis Kontijen
Polis DiRaja Malaysia
15990 Kota Bharu
Kelantan

Rujukan : (PR) RF/74999

Tarikh: 16 April, 1997

Encik Ishak bin Mansor,
Kopral - RF/74999

KEPUTUSAN TINDAKAN TATATERTIB

Adalah saya Nordin bin Zakaria, P/SAC II Timbalan Ketua Polis Kelantan, telah mendapati bahawa anda telah dikenakan Perintah Sekatan di bawah Sek. 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) No. 5/69 selama 2 tahun mulai 15 April 1997, di Bandaran Jasin, Daerah Jasin, Melaka.

2. Oleh yang demikian saya Nordin bin Zakaria, P/SAC II Timbalan Ketua Polis Kelantan pada menjalankan kuasa-kuasa tatatertib yang telah diwakilkan oleh Suruhanjaya Pasukan Polis melalui P.U.(B) 621 bertarikh 19/12/1985 dan peruntukan kuasa di bawah Peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 dan setelah meneliti serta

menimbangkan nota-nota yang diterima berkaitan kes tersebut, telah memutuskan anda di "Buang Kerja" di bawah Peraturan 38(g), Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuat kuasa mulai 15 April, 1997 iaitu tarikh anda dikenakan Perintah Sekatan.

3. Sila akui penerimaan surat ini dengan menandatangani di ruangan yang telah di sediakan.

t.t.
(NORDIN BIN ZAKARIA) P/SAC II
TIMBALAN KETUA POLIS KELANTAN

AKUAN TERIMA

Saya, Ishak bin Mansor mengaku menerima naskah asal surat gantung kerja 74999 keputusan tindakan tatatertib bilangan (TR) RF 74999 bertarikh 16.4.1997 pada 16.4.1997 jam 1545 hrs.

Diserahkan oleh : (Ali bin Mohamad) Supt
Ketua Polis Daerah
18300 Gua Musang
Kelantan

Tarikh/Masa: 16.4.1997 1545 hrs

The Plaintiff's Application

[21] The plaintiff filed a suit two years later. The original writ and statement of claim filed by the plaintiff on 13 May 1999 named the Deputy Minister of Home Affairs as the 1st defendant, the Disciplinary Authority as the 2nd defendant and the Government of Malaysia as the 3rd defendant. The pleadings as initially framed by the plaintiff challenged the validity of the Restriction Order issued by the Deputy Minister of Home Affairs. Consequently, the plaintiff alleged that the decision to dismiss him by the Disciplinary Authority based on such a Restriction Order was invalid and had no legal effect.

[22] The plaintiff amended his statement of claim almost three years later. By the amendments made to the statement of claim pursuant to the order dated 15 April 2002, the Deputy Minister of Home Affairs was no longer a party to the proceedings. For ease of reference the new paras. 7(g) and (h) of the amended statement of claim is set out below:

(g) Bahawa Pihak Berkuasa Tatatertib telah tidak mematuhi Peraturan 37 Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) dalam melaksanakan proses pembuangan kerja keatas Plaintif mengikut surat pembuangan kerja bertarikh 16-04-1997.

(h) Bahawa Pihak Berkuasa Tatatertib telah melanggari doktrin "Legitimate Expectation" dalam pembuagan kerja ke atas Plaintif.

(i) Bahawa Pihak Berkuasa Tataterib mempunyai minda yang "BIAS" dalam pembuangan kerja terhadap Plaintif.

[23] The amended declaratory orders sought by the plaintiff are: that his dismissal by letter dated 16 April 1997 under reg. 37 of the 1993 Regulations was invalid and of no legal effect; that he was still an employee of the Government of Malaysia with the rank of Corporal in the Police Force, as well as for consequential orders.

The High Court Decision

[24] The learned High Court Judge took the position that the matters in issue required him to answer two questions. Firstly, whether the 1993 Regulations applied to the plaintiff? If the answer to this question was "Yes", that the 1993 Regulations applied to the plaintiff, then whether reg. 37 of the 1993 Regulations had been complied with?

[25] Based on the evidence and submissions before him the learned judge ruled that the 1993 Regulations did not apply to the plaintiff. In view of this ruling, there was accordingly no necessity for him to make a ruling on the second question.

[26] The learned judge's reasoning as to why the 1993 Regulations did not apply to the plaintiff was this. The plaintiff holding the rank of Corporal was a junior police officer. The learned judge was of the view that the plaintiff can only be subjected to one disciplinary Regulations based on the authority of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777. That case concerns a police officer holding the rank of Lance Corporal. The complaint there was that of procedural unfairness by reason of the failure to inform the officer concerned of the likelihood of being dismissed

A or reduced in rank. The contention in that case was that the 1993 Regulations applied. On this issue of alleged procedural unfairness the Federal Court ruled that the Court of Appeal had erred in importing reg. 28 of the 1993 Regulations into the 1970 Regulations.

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[27] The learned judge was of the view that in the absence of a similar provision similar to reg. 37 of the 1993 Regulations being inserted into the 1970 Regulations, it was not open for the Disciplinary Authority to adopt the procedure set out in reg. 37 C of the 1993 Regulations to the plaintiff. The order of dismissal of the plaintiff made by the 1st defendant was then declared to be invalid. The plaintiff's application was then allowed. The order of dismissal made against the plaintiff was then set aside.

D **The Submissions**

[28] The Senior Federal Counsel (SFC) highlighted the fact that a public officer who is subjected to an order of detention, supervision, restricted residence, banishment or deportation, had no right of being heard as the proviso to cl. 2 of art. 135 of the E Federal Constitution applied.

[29] The SFC submitted that the learned judge erred in ruling that the plaintiff can only be subjected to only one disciplinary Regulations. According to her, in the absence of an express F provision in the 1970 Regulations prescribing the procedure to be followed upon a junior police officer being subjected to an order of detention, supervision, restricted residence, banishment or deportation, the Disciplinary Authority was right in adopting the procedure prescribed covering this express situation as provided G under reg. 37 of the 1993 Regulations.

[30] As to the decision of the Federal Court upon which the learned judge's decision was grounded, *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777, the SFC submitted that the case can be H distinguished on the facts. The procedure consequent upon the issuance of a Restriction Order against a junior police officer was not an issue in that case.

[31] The record shows that all of the regulations in particular, I reg. 37, had been strictly complied with. The dismissal of the plaintiff was in accordance with the procedure prescribed by law, and accordingly valid and of full legal effect.

[32] The submission of the respondent's counsel was in line with the reasoning given by the High Court Judge in his judgment.

Decision

[33] As submitted by the SFC and the respondent's counsel, judicial review is concerned with the decision making process. The issue for determination in this case is, what is the procedure to be adopted by a Disciplinary Authority upon being notified that a Restriction Order under the 1969 Ordinance had been made against the plaintiff, a junior police officer?

[34] We would like to firstly make the following observations. The Restriction Order issued against the plaintiff was for a period of two years, from 15 April 1997 to 15 April 1999. This action was filed on 13 May 1999, after the Restriction Order had already lapsed. Be that as it may the plaintiff deemed it fit to challenge the validity of the already spent Restriction Order. The plaintiff's case was that the order of dismissal based on the already spent Restriction Order was invalid.

[35] The amendment in 2002 to the statement of claim clearly had the following effect. The validity of the Restriction Order issued by the Minister of Home Affairs against the plaintiff was no longer the subject matter of challenge. The cause of action, consequent upon the amended pleadings, was no longer grounded on an invalid Restriction Order but allegedly by reason of the Disciplinary Authority having adopted a procedure which was not applicable to him.

[36] Pausing here for a moment, by reason of the Restriction Order no longer being challenged, this must necessarily be construed to mean that the plaintiff accepts that the Restriction Order issued against him as being valid and of full legal effect. In any event it is now settled law that it is not for the Disciplinary Authority to question the validity of the Restriction Order issued against the plaintiff. The validity of such an order is clearly not open to collateral attack (See *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245).

[37] The learned judge was persuaded by the submissions of the plaintiff's counsel. He ruled that the plaintiff can only be subjected to only one disciplinary regulations. Consequent upon the

Restriction Order being issued against the plaintiff, the 1970 Regulations was the regulations that was applicable to the plaintiff. He ruled that the Disciplinary Authority had erred in adopting the procedure prescribed in the 1993 Regulations.

[38] We take the view that the provisions of the Federal Constitution, the Police Act as well as the 1970 and 1993 Regulations must be read together and be given a harmonious construction. Our reading of the legal provisions referred to us in arguments are as follows. Every police officer unless expressly excluded is subject to the same provisions as are applicable to other public officers of corresponding status in the service of the Government of Malaysia (s. 74 Police Act). Pursuant to art. 132 of the Federal Constitution a member of the police force is a member of the public service.

[39] All members of the Police Force are also subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under art. 132(2) of the Federal Constitution or under s. 96 of this Act (s. 18 of the Police Act). This would in our view also include junior police officers.

[40] With respect, we are unable to agree with the learned judge's ruling that a junior police officer can only be subjected to only one disciplinary regulations. There is no such general principle. A junior police force can certainly be subjected to more than one. Whether or not a particular regulation is applicable to such an officer must necessarily depend on the express words used in that regulations. In this case the applicability of the 1993 regulations to an officer such as the plaintiff must certainly be determined by examining the provisions of the 1993 Regulations itself.

[41] Our reading of the provisions referred to us was that, not only was the 1970 Regulations applicable to the plaintiff, but the 1993 Regulations was equally applicable to him. We note that there is no clause in the 1993 Regulation expressly excluding junior police officers from its application. In our considered opinion effect must be given to reg. 2 of the 1993 Regulations which expressly provides that the 1993 Regulations applies to an "officer" throughout the period of his service. The same section defines an "officer" to mean "a member of the public service of the Federation", of which the plaintiff was certainly one.

[42] In view of the fact that there is no express provision as to the procedure to be followed by the Disciplinary Authority in the 1970 Regulations when a Restriction Order is issued against such an officer, the Disciplinary Authority was, in our considered opinion, right in following the procedure prescribed to cover this express situation, ie, that prescribed by reg. 37 of the 1993 Regulations. This particular misconduct it is to be noted is not expressly listed in the schedule to the 1970 Regulations.

[43] Such a construction would accordingly be in accord with cl. 2(d) of art. 135 of the Federal Constitution. The plaintiff, being the subject of a Restriction Order under the 1969 Ordinance, was clearly not entitled to be given the right to be heard. The interpretation given by the learned judge in ruling that reg. 37 of the 1993 Regulations was not applicable to the plaintiff would result in the Disciplinary Authority having to observe the orderly room procedure in respect of the misconduct that had been committed: the plaintiff to be given a hearing, to be represented by a police officer of his choice, in other words, the right to be heard. Such an interpretation was clearly inconsistent with the intention of the legislature taking away the right of such a public officer who was the subject of such an order to be heard.

[44] We are accordingly in agreement with the submissions of the SFC that the case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* can be distinguished on facts. The procedure to be followed consequent upon the issuance of a Restriction Order under the 1969 Ordinance against a junior police officer clearly was not an issue in that case.

[45] To sum up, we are of the view that there is no flaw in the decision making process of the Disciplinary Authority in making the order of dismissal against the plaintiff. Once the Restriction Order under the 1969 Ordinance had been issued by the Minister of Home Affairs against the plaintiff, it was incumbent upon the Disciplinary Authority to exercise the power conferred upon them by regs. 36 and 46. Thereafter, reg. 37 of the 1993 Regulations applied.

A **[46]** In considering the appropriate punishment to be imposed, the Disciplinary Authority had deemed it fit to impose the most severe punishment upon the plaintiff. There is no basis whatsoever for us the interfere with the said decision. To conclude, our finding is that the order of dismissal made by the 1st defendant was
B accordingly valid and of full legal effect.

[47] For the abovementioned reasons the defendants' appeal was allowed with costs.

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